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IN THE

Supreme Court of the United States

October Term, 1976.

No. 75-1812.

R. F. SHAFFER, et al.,

Appellants,

v.

ARNOLD HEITNER, as Custodian for MARK ANDREW HEITNER,

Appellee.

On Appeal From the Supreme Court of the State of Delaware.

APPELLANTS' BRIEF ON THE MERITS.

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OPINIONS BELOW.

The opinion of the Supreme Court of the State of Delaware is reported at 361 A. 2d 225. The opinion of the court of chancery is not reported. Copies are reproduced in the Joint Appendix at pages A97 and A73 respectively.

JURISDICTION.

This is a shareholder's derivative action commenced in the Delaware Court of Chancery. Plaintiff-appellee Heitner sought to obtain personal jurisdiction over defendants-appellants, none of whom resides in Delaware, by sequestering their shares of capital stock in a Delaware corporation. The seizure was purportedly effected by an order directing the corporation to make appropriate notations on its books. The court of chancery denied defendants' motion to quash the sequestration order and to dismiss. The Supreme Court of Delaware affirmed on April 15, 1976. The notice of appeal to this Court was filed in the Delaware Supreme Court on May 7, 1976. This Court has jurisdiction under section 1257(2) of Title 28, United States Code, on the ground that the decision below upheld the validity of a state statute against a claim that it is repugnant to the fourteenth amendment of the United States Constitution. Probable jurisdiction was noted on October 4, 1976.

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED.

The statute involved is the Delaware sequestration statute, 10 *Del. C.* § 366. It is set out in full text in Exhibit A to this brief. The constitutional provision involved is section 1 of the fourteenth amendment to the Constitution of the United States, which provides in pertinent part as follows:

> ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

QUESTION PRESENTED.

Does the fourteenth amendment permit Delaware to coerce nonresident individual defendants having no contacts with Delaware to submit to personal jurisdiction of the Delaware courts by sequestering, without notice or hearing and without taking physical possession, capital stock owned by them in a Delaware corporation, and denying them the right to defend that property unless they enter a general appearance which would subject them to possible liability in amounts exceeding the value of the sequestered property?

STATEMENT OF THE CASE.

This is a derivative action brought by a holder of one share of stock of The Greyhound Corporation ("Greyhound") against twenty-eight individuals or, in one case, an estate, purportedly on behalf of Greyhound, and Greyhound's wholly-owned subsidiary, Greyhound Lines, Inc. The amended complaint alleges that during the period 1957 to 1974 certain of the individual defendants were officers or directors of Greyhound, a Delaware corporation with its principal place of business at Phoenix, Arizona, and that the remaining individual defendants were officers or employees of Greyhound Lines, Inc., a California corporation which also has its principal place of business at Phoenix, Arizona. The complaint charges that Greyhound suffered losses as a result of conduct of defendants which allegedly caused Greyhound to have been found to have violated the antitrust laws as well as an order of a United States district court (A. 4-17, 39-40).[1]

Neither the plaintiff nor any of the individual defendants is a resident of Delaware. No individual defendant was served personally with summons, nor was there any attempt to demonstrate that any of them has or ever had any contact with Delaware.

Instead, plaintiff sought to subject defendants to Delaware's jurisdiction by invoking the procedure under Delaware's sequestration statute, 10 *Del. C.* § 366, and sequestering Greyhound capital stock owned by the defendants.

On May 22, 1974, upon the filing of his complaint, plaintiff applied for and the Delaware Court of Chancery issued, without notice or hearing, an order,

> 1. Directing the individual defendants to appear and answer the complaint;

1. The Joint Appendix is cited herein as "A.—."

> 2. Seizing "property of the [individual] defendants in the State of Delaware;" and
>
> 3. Directing the sequestrator to cause Greyhound to report on the securities held by defendants, to cause entries to be made in its books showing that the securities had been sequestered, not to transfer those securities or permit them to be transferred, except as permitted by the order, and to do all that is necessary to hold these securities until further order (A. 19-24, 49-54).

Under the Delaware procedure, as interpreted and applied by its courts, the defendants have no remedy against the seizure, or any subsequent disposition of the property (other than for technical noncompliance with the statute), nor do they have a right to defend against plaintiff's claims on the merits, unless they make a general appearance and submit to the *in personam* jurisdiction of the Delaware court.

On July 30, 1974, the individual defendants filed a notice and motion to quash service of process, to vacate the order of sequestration and to dismiss the action as to them. Their motion was based primarily on the ground that the Delaware sequestration procedure violates the due process clause of the fourteenth amendment of the United States Constitution (A. 37-38)[2]. The court of chancery denied defendants' motions and upheld the validity of the Delaware statute (A. 73), and the Delaware Supreme Court affirmed (A. 97). This appeal followed.

2. Subsequent to the filing of the motion, plaintiff was granted leave to file an amended complaint in order to cure a technical defect raised by defendants, and an alias writ of sequestration was issued. Defendants then moved again on the same grounds against these pleadings (A. 47-54, 68-69).

SUMMARY OF ARGUMENT.

Delaware has seized defendants' property without notice or any opportunity for hearing. The purpose of the seizure is to force defendants to submit to *in personam* jurisdiction in a private action brought by a nonresident plaintiff. The seizure was premised solely upon defendants' nonresidence and the fictional situs of shares of capital stock in Delaware, without consideration by anyone of the merit or lack of merit of plaintiff's claims. Delaware does not afford defendants any way to obtain the release of the property or to defend their right to it except by giving up their constitutional rights under the fourteenth amendment and *International Shoe Co. v. Washington*, 326 U. S. 310 (1945).

The Delaware procedure that takes away defendants' property without notice, hearing or other protection and denies them the right to defend unless they waive their constitutional rights obviously denies them due process of law.

Moreover, Delaware has attempted to coerce defendants to submit to *in personam* jurisdiction by seizing and threatening to dispose of their property by judicial sale although none of the defendants has the minimum contacts with Delaware required by the Constitution. That, in itself, violates defendants' fourteenth amendment rights.

Finally, Delaware cannot avoid what the Constitution requires by labeling the jurisdiction *quasi in rem*. This is so because Delaware's conceded purpose is to subject defendants to personal jurisdiction, because the existence of defendants' "property" in Delaware is wholly fictional and because Delaware does not permit defendants to defend at all unless they appear and put at risk not only the "property" seized, but everything else they have as well.

ARGUMENT.

I. The Sequestration Statute as Applied Violates Due Process Because It Deprives Defendants of Their Property Without Notice or Opportunity for Hearing or Other Adequate Safeguards.

We start with certain undisputed characteristics of the Delaware sequestration procedure. First, defendants' property is seized with no prior notice or hearing. Second, to obtain the seizure order as a matter of right plaintiff need only allege that defendants are nonresidents and that they own property in Delaware; whether plaintiff's claim has any merit is irrelevant.[3] Third, the principal purpose of the seizure is to coerce defendants to waive their due process rights and submit to the personal jurisdiction of the Delaware court where it would not otherwise exist. Fourth, defendants have no right even to any post-seizure hearing to defend their property *at all* unless they do submit to unlimited personal jurisdiction. Finally, if defendants stand on their rights and do not enter a general appearance the court may order their property to be sold without affording defendants any right to contest the merits of the alleged claim.

A procedure more unfair than this is difficult to conceive. It is in square conflict with this Court's decisions in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U. S. 601 (1975), *Fuentes v. Shevin*, 407 U. S. 67 (1972) and *Sniadach v. Family Finance Corp.*, 395 U. S. 337 (1969), which establish that a seizure of property without notice or hearing is unconstitutional except in extraordinary situations and unless there are sufficient other safeguards to satisfy due process.

3. There is no requirement that plaintiff's complaint be verified.

Even the Delaware Supreme Court acknowledged that "[s]uch a proceeding has the seeds if not the fruits of unfairness in permitting the impounding of property before judgment and, under some circumstances, upon thin assertions of right." (A. 99-100). Nevertheless, it sustained the sequestration procedure upon the dubious authority of *Ownbey v. Morgan*, 256 U. S. 94 (1921), and some superficial trappings of the procedure which appeared to it to provide safeguards.

A. Obtaining Jurisdiction Over Nonresident Defendants in a Private Civil Action Is Not an Extraordinary Situation.

The basis for the Delaware Supreme Court's conclusion that notice and hearing could be excused was its view that the acquisition of personal jurisdiction constitutes an "extraordinary situation." For that it relied upon *Ownbey v. Morgan*. *Ownbey*, in effect, assumed the validity of Delaware's foreign attachment statute which provided for a procedure at law analogous to the sequestration procedure in equity.[4] All the *Ownbey* Court held was that a nonresident defendant constitutionally could be required to post special bail before he was permitted to make a general appearance and secure release of the attachment. Mr. Justice Pitney, speaking for the Court, found the procedure constitutional simply because it was old:

> "A procedure customarily employed, long before the Revolution, in the commercial metropolis of England, and generally adopted by the States as suited to their circumstances and needs, *cannot be deemed inconsistent with due process of law*, even if it be taken with its ancient incident of requiring security from a defendant who, after seizure of his property, comes within the jurisdiction and seeks to interpose a defense. The condition imposed has a reasonable relation to the conversion of a proceeding *quasi in rem* into an action *in personam;* ordinarily it is not difficult to comply with,—a man who has property usually has friends and credit,—and hence in its normal operation it must be regarded as a permissible condition . . . ." 256 U. S. at 111.[5]

4. As one commentator explains:

> "The constitutionality of the jurisdictional attachment in *Ownbey* was never challenged; indeed, the plaintiff [sic, defendant] argued for its continuation. Hence, it is unclear on what basis the courts can now use the citation of that case in *Sniadach* to justify *quasi in rem* seizure in all situations." Note, *Quasi In Rem Jurisdiction and Due Process Requirements*, 82 Yale L. J. 1023, 1026 (1973).

Ownbey v. Morgan is plainly a relic from another age.[6] As the Court of Appeals for the Third Circuit recently put it, ". . . *Fuentes, Mitchell* and *Di-Chem* cast serious doubt on *Ownbey's* current strength." *Jonnet v. Dollar Sav. Bank of City of New York*, 530 F. 2d 1123, 1128 (3rd Cir. 1976). And again, even more recently:

5. All emphasis herein is added unless otherwise stated.

6. One commentator has described it as "one of the more egregious injustices of modern times." Currie, *Attachment and Garnishment in the Federal Courts*, 59 Mich. L. Rev. 337, 379 (1961). Even contemporary comment on *Ownbey v. Morgan* suggested that the rule on which it was based had no place in modern jurisprudence:

> "It appeared that this harsh rule was derived from the Custom of London in foreign attachment, and had been brought over to America by the colonists, and that in Delaware it could show statutory continuity down to the present time. The court cites a number of cases from other seaboard states where the Custom of London also obtained a foothold, but an investigation of the statutory history of the rule in those states seems to indicate that in every one of them the rule long since succumbed to the progress of enlightened civilization and passed over the Styx into the shadowy land of legal tradition where the ghosts of ancient laws wander restlessly forever." Comment, 19 Mich. L. Rev., 853, 854 (1921).

"In relying on the historical validity of the practice, *Ownbey* ignored the fact that state procedures had no due process significance prior to the 1868 adoption of the Fourteenth Amendment. Moreover, the Supreme Court, more recently, has tartly reminded that '[t]he fact that a procedure would pass muster under a feudal regime does not mean it gives necessary protection to all property in its modern forms.' *Sniadach v. Family Finance Corp.*, 395 U. S. 337, 340, 89 S. Ct. 1820, 1822, 23 L. Ed. 2d 349 (1960). Judge Gibbons has concluded that '[i]t is inconceivable that *Ownbey* would be decided today as it was decided in 1921.' *Jonnet v. Dollar Savings Bank*, 530 F. 2d 1123, 1136 (3rd Cir. 1976).

• • •

"The brute fact is that *Ownbey* adjudicated the constitutionality of a statutory procedure since abandoned." *U. S. Industries, Inc. v. Gregg*, 540 F. 2d 142, 152 (3rd Cir. 1976) (opinion set forth in full in Exhibit A to Brief of Appellants in Opposition to Motion to Dismiss and/or to Affirm).

Nevertheless, references to *Ownbey* appear in the opinions of this Court in both *Fuentes* and *Sniadach* and in Mr. Justice Powell's concurring opinion in *North Georgia Finishing*. See 407 U. S. at 91; 395 U. S. at 339; 419 U. S. at 610. Additional references in the same context are found in *Astol Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U. S. 663, 679 (1974), and *Mitchell v. W. T. Grant Co.*, 416 U. S. 600, 613 (1974), both of which involved the validity of certain prehearing seizure procedures.

The Delaware Supreme Court reviewed the Court's references to *Ownbey* in those decisions, acknowledged that their significance for foreign attachment statutes "is by no means complete, or clear" (A. 107), but nevertheless concluded that an attachment necessary to secure jurisdiction of a state court is an "extraordinary situation" in which notice and hearing may be excused (A. 107).[7] In reaching that conclusion the Delaware Court emphasized the footnote in *Fuentes* indicating that securing jurisdiction in a state court is "clearly a most basic and important public interest." 407 U. S. at 91, n. 23; A. 107. But, in relying upon the footnote the Delaware Supreme Court ignored the text. And it was in the text of *Fuentes* that this Court spoke directly to the question of "extraordinary situations":

"There are 'extraordinary situations' that justify postponing notice and opportunity for a hearing. *Boddie v. Connecticut*, 401 U. S., at 379. *These situations, however, must be truly unusual.* Only in a few limited situations has this Court allowed outright seizure without opportunity for a prior hearing. First, *in each case, the seizure has been directly necessary to secure an important governmental or general public interest.* Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a governmental official responsible for determining, *under the standards of a narrowly drawn statute, that it was necessary*

7. The Delaware Court even suggested that the jurisdictional motivation for the seizure might somehow render inapplicable the constitutional principles of *Sniadach, Fuentes, Mitchell* and *North Georgia* (A. 109). But clearly a creditor who sold the property seized and retained some interest in it (such as the vendor's lien in *Mitchell*) has a *stronger* basis for attachment than someone like the plaintiff here, who has no claim to the property and seizes it to obtain jurisdiction. See *Mitchell v. W. T. Grant Co.*, 416 U. S. 600, 604 (1974), and *Fuentes v. Shevin*, 407 U. S. 67, 84, 86 (1972).

and justified in the particular instance. Thus, the Court has allowed summary seizure of property to collect the internal revenue of the United States, to meet the needs of a national war effort, to protect against the economic disaster of a bank failure, and to protect the public from misbranded drugs and contaminated food.

"The Florida and Pennsylvania prejudgment replevin statutes serve no such important governmental or general public interest. They allow summary seizure of a person's possessions when no more than private gain is directly at stake. . . . But state intervention in a private dispute hardly compares to state action furthering a war effort or protecting the public health." 407 U. S. at 90-93 (footnotes omitted). See also *Astol Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U. S. at 679.

The Delaware sequestration statute is neither designed nor necessary to serve any basic or important governmental or general public interest. Sequestration is available to any private plaintiff who files an action in Delaware on any claim against any nonresident defendant, so long as that defendant happens to own securities issued by any Delaware corporation or other property which the Delaware Court considers subject to seizure.[8]

8. In view of the large number of corporations incorporated in Delaware, and the fact that their securities are widely held by the public, there are potentially hundreds of thousands, if not millions, of persons who are subject to Delaware's sequestration process (a process which is not restricted to officers or directors but runs against any nonresident shareholder). Indeed, officers and directors of a Delaware corporation are not required to own shares in the corporation, and such ownership, to the extent it is present in this case, is totally irrelevant to the charges made. 8 *Del. C.* § 141(b).

In short, the Delaware sequestration statute is not "narrowly drawn" and seizures are not limited to any "extraordinary" or "truly unusual" situations (pp. 11-12 above). Instead, they are used for the routine acquisition of jurisdiction over nonresident defendants in purely private disputes. That is not "extraordinary." It is commonplace.

Moreover, a drastic procedure such as sequestration is not at all "directly necessary" to serve a state's interest in affording its residents a remedy against foreign defendants. See *Fuentes v. Shevin*, 407 U. S. at 91. Whatever may have been the need for other procedures such as sequestration in the past, it is anything but compelling now that long-arm statutes are available. See *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U. S. 601, 610 n. 1 (1975) (Powell, J., concurring).[9] But the exercise of jurisdiction under long-arm statutes of course is subject to the due process requirements enunciated in *International Shoe*. Delaware tries to evade these due process requirements by using sequestration rather than long-arm service. As discussed below, this attempt to exercise jurisdiction absent the minimum contacts required by *International*

9. As the Court in *U. S. Industries, Inc. v. Gregg*, 540 F. 2d 142 (3rd Cir. 1976), pointed out, the development of long-arm statutes has also contributed to *Ownbey's* obsolescense:

> "In *Fuentes*, the Supreme Court mentioned *Ownbey* as involving an attachment 'necessary to secure jurisdiction.' It is worth remembering that *Ownbey* was decided before *International Shoe* stimulated the enactment of long arm statutes. When *Ownbey* was decided, attachment was often necessary to secure jurisdiction (*quasi in rem*) over a nonresident defendant; today, at least if there are minimum contacts, full *in personam* jurisdiction can usually be obtained under a long arm statute. Arguably, then, the need to secure jurisdiction that justified *Ownbey* is now fully met by long arm jurisdiction, and could no longer serve to support the harsh result in that case." 540 F. 2d at 153 n. 6. See also Note, *Quasi in Rem Jurisdiction and Due Process Requirements*, 82 Yale L. J. 1023, 1031-1032 (1973).

Shoe itself violates appellants' due process rights. See part II below. It certainly cannot justify denial of their right to notice and hearing prior to seizure of their property. See Folk and Moyer, *Sequestration in Delaware: A Constitutional analysis,* 73 Colum. L. Rev. 749, 765-768 (1973).

B. There Are No Other Safeguards.

Even if the Delaware sequestration procedure were limited to extraordinary situations permitting seizure prior to hearing, which it clearly is not, it could be sustained only if it provides sufficient other safeguards to satisfy the requirements of due process, including a prompt and meaningful post-seizure hearing. But there are no such safeguards here, and defendants are not entitled to any meaningful post seizure hearing unless they waive their constitutional rights.

The court below acknowledged the requirement for adequate safeguards and enumerated those it thought to exist under the Delaware procedure (A. 109-114). Upon analysis, however, the provisions enumerated by the court are revealed as providing no safeguards at all.

(1) The court states that a court order is required for sequestration, but Delaware law gives the court no discretion to deny an application for a writ; a litigant is entitled to it as a matter of right, and the "sole relevant facts . . . are defendants' non-residence and their ownership of property within the state." Appellee's Motion to Dismiss and/or Affirm, p. 7, n. 9. The trial court below in its opinion denying appellants' motions stated in this respect:

> "The sequestration statute contains no provision for review by this Court as to the necessity for its use. By case precedent it is established that a plaintiff is entitled to sequestration as a matter of right as long as his application meets procedural formalities. If the application is formally sound, this Court has no discretion to deny this right. *Breech v. Hughes Tool Co.*, Del. Supr., 189 A. 2d 428 (1963). Nor does the Court have the power to first consider the merits of the claim as a condition to authorizing sequestration. *Trans World Airlines, Inc. v. Hughes,* Del. Ch., 185 A. 2d 762 (1962), *aff'd sub nom., Breech v. Hughes Tool Co., supra.*" (A. 83)

In the cited decision of *Trans World Airlines, Inc. v. Hughes,* 40 Del. Ch. 523, 185 A. 2d 762 (Ch. 1962), *aff'd sub nom. Breech v. Hughes Tool Co.,* 41 Del. Ch. 128, 189 A. 2d 428 (Sup. Ct. 1963), Vice Chancellor Marvel held:

> "Upon application for an order of sequestration Hughes Tool Company was required by court rule to establish that the non-resident Mr. Breech not only owned property in Delaware but that the other requirements of the applicable statute and rule had been met. This having been done, *an order of sequestration issued as a matter of course. It will not be quashed merely because the charges made against Mr. Breech may be insubstantial.*" 40 Del. Ch. at 528, 185 A. 2d at 765.

And the Delaware Supreme Court said, affirming that decision:

> "It has never been suggested, so far as we know, that the use of this process by a litigant is controllable by the court's discretion. We think that *he is entitled to it as a matter of right, just as he is entitled to a writ of summons.*" 41 Del. Ch. at 134, 189 A. 2d at 431-2.

In view of these statements of the law, to imply, as the opinion below does, that the signature of a judge, rather than a clerk, on an order gives rise to the kind of "control of the process" which this Court found to satisfy due process in *Mitchell* is ludicrous. *Cf. Mitchell v. W. T. Grant Co.*, 416 U. S. at 625 (Powell, J., concurring); *Carey v. Sugar*, – U. S. –, 96 S. Ct. 1208 (1976). Quite the contrary, Delaware's procedure is more accurately described by the Court's words in *Fuentes*:

> "The statutes, moreover, abdicate effective state control over state power. Private parties, serving their own private advantage, may unilaterally invoke state power to replevy goods from another. No state official participates in the decision to seek a writ; no state official reviews the basis for the claim to repossession; and no state official evaluates the need for immediate seizure." 407 U. S. at 93. See also 407 U. S. at 91.

(2) The court states that the property to be seized must be identified with reasonable certainty. It is difficult to see how this would protect due process rights; it seems intended to help the sequestrator to locate and take away defendants' property. But in any event, the order of sequestration in this case directed the sequestrator to seize

> ". . . property of the defendants in the State of Delaware, consisting of common stock, 3% Second Cumulative Preference [sic] Stock, stock unit credits, of the Greyhound Corporation and all options and all warrants to purchase the common or preferred stock of said corporation issued to the defendants and all contractual obligations, rights, debts or credits due or accrued to or for the benefit of any of said defendants under any type of written instrument, contract or other legal instrument of any kind whatever between any of the defendants and said corporation . . . ." (A. 50)

This recital does not identify property to be seized–it is a dragnet clause, pure and simple.

(3) The court states that "the value of the property seized must be reasonably related to the amount of the claim asserted." However, there is no such requirement in the statute; [10] the court has no discretion to deny a writ on this ground (as established by the cases cited at p. 15 above); there is no procedure available under the statute by which a defendant could even raise the issue without having first made a general appearance; and nothing in the record reflects compliance with any such requirement.

(4) The court states that notice must be promptly given to a defendant after seizure, but since he has no right to a hearing on the merits of the seizure, such notice does little to protect his rights.

(5) The court states that defendant may appear to attack compliance with § 366, but this gives him the right only to raise issues concerning compliance with the technical requirements of the statute and its constitutional validity. "There is no provision for an early hearing at which the . . . [plaintiff] would be required to demonstrate at least probable cause for the garnishment" (*North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U. S. at

10. The opinion in the *Hughes* case, cited by the court as its authority for the statement, does not support it at all, as shown when the sentence from which the court quotes is read in its entirety:

> "Furthermore, *there is no limitation contained in Title 10 Del. C. § 366 as to the seizure of a nonresident's property* in Delaware, although, of course, the property so caused to be seized *should* always bear some reasonable relationship to the amount of the claim asserted." 40 Del. Ch. at 527, 185 A. 2d at 765.

607), let alone for a hearing at which defendant can question, even preliminarily, the merits of plaintiff's claim without waiving his rights under *International Shoe* and subjecting himself to personal jurisdiction. Without such provision, the statute plainly cannot withstand scrutiny under the Fourteenth Amendment.

In *North Georgia Finishing, Inc.*, the Court struck down Georgia's garnishment statute in part because it barred challenge of the garnishment without the prior filing by the debtor of a bond. See 419 U. S. at 607 & n. 5. Indeed, Justice Powell found this the "most compelling deficiency" in that procedure. 419 U. S. at 613 (Powell, J., concurring). Delaware's sequestration statute presents the *a fortiori* case. It bars a challenge without the prior general appearance by the defendant, obviously a more risky and costly step than merely filing a bond. Moreover, it impermissibly conditions exercise of the constitutionally required right to a hearing on waiver of the constitutional right to trial in a forum with the requisite minimum contacts. *Cf. Terral v. Burke Construction Co.*, 257 U. S. 529 (1922); see *Developments in the Law State-Court Jurisdiction*, 73 Harv. L. Rev. 909, 954 (1960). Conditioning the defendants' right to a hearing on his submission to *in personam* jurisdiction against which the Constitution would otherwise protect denies the defendant "a meaningful opportunity to be heard". *Boddie v. Connecticut*, 401 U. S. 371, 379 (1971).

(6) The court states that defendant may petition for release of the property and suggests that the court, in considering such a petition, may conduct a preliminary inquiry into the merits of the claim to determine whether the property should be released. But defendant can file such a petition only if and after he has submitted to personal jurisdiction; by then, the damage has been done—

the seizure has been accomplished and the defendant has been coerced into making a general appearance in order to gain access to the court to make such a petition. The right to file such a petition so conditioned obviously does not cure the constitutional defect of the statute.[11]

(7) The court states that after the defendant has made a general appearance, no new causes of action may be added to the complaint. But again, this limitation does not diminish the concededly coercive operation of the procedure which offends due process. See *Tenney v. Jacobs*, 43 Del. Ch. 526, 528-529, 240 A. 2d 138, 139 (Sup. Ct. 1968).

(8) The court states that while the property is seized, the owner may sell it or otherwise deal with it so long as all proceeds are deposited with the sequestrator, but this provision does not lessen the deprivation and coercion inherent in the procedure. Surely seizure does not become acceptable by giving the defendant the right to substitute other property. Appellants' property here was at least as completely seized as the bank account involved in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U. S. 601 (1975).

In sum, all the so-called safeguards listed by the Court below do nothing to eliminate the constitutional defects in the Delaware sequestration procedure. If they were all applied the most a defendant can hope for is that he will have lost only his constitutional rights under *International Shoe*. That is not due process of law.

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11. It is clear, moreover, that the availability of a quick release provision would not in any event cure a prior unconstitutional deprivation of property rights. See *Fuentes v. Shevin*, 407 U. S. at 84-86; *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U. S. at 601.

II. Even if the Sequestration Process Were Otherwise Constitutional, Appellants May Not Constitutionally Be Coerced to Submit to the Personal Jurisdiction of the Delaware Court in the Absence of Minimal Contacts of the Defendants With Delaware.

The procedural constitutional defect in the Delaware sequestration statute is compounded by the fact that its conceded purpose is to coerce nonresidents not otherwise subject to the jurisdiction of Delaware to submit to that jurisdiction upon threat of forfeiture of their property within the state. See A. 108-109, and *Tenney v. Jacobs,* 43 Del. Ch. 526, 528, 240 A. 2d 138, 139 (Sup. Ct. 1968). Unless a defendant whose property has been sequestered makes a general appearance, he cannot defend his right to that property; the property may be sold and the proceeds applied to satisfy plaintiff's claim without any adversary hearing whatsoever. *Sands v. Lefcourt Realty Corp.,* 35 Del. Ch. 340, 117 A. 2d 365 (Sup. Ct. 1955).

But any attempt by a state to acquire jurisdiction over nonresidents brings into play the due process limitations mandated by *International Shoe* and *Hanson v. Denckla,* 357 U. S. 235 (1958); any assertion of jurisdiction must rest upon minimum contacts between the defendant and the forum such that maintenance of the suit satisfies traditional notions of fair play and substantial justice. 326 U. S. at 316.

> "[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla,* 357 U. S. 235, 253 (1958).

In this case, none of the individual defendants resides in Delaware and none has, or has been shown to have, any

contacts with Delaware satisfying the *International Shoe* and *Hanson* test. Accordingly, none would be subject to personal jurisdiction even had he been properly served under a long-arm statute.

The court below sought to brush *International Shoe* aside as inapplicable on the stated ground that

> ". . . jurisdiction under § 366 remains . . . *quasi in rem* founded on the presence of capital stock here, not on prior contact by defendant with this forum (A. 102).
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> "We hold that seizure of the Greyhound shares is not invalid because plaintiff has failed to meet the prior contacts tests of *International Shoe.*" (A. 103).

But, as this Court previously has held, the question of jurisdiction cannot be disposed of by resort to labels:

> "[T]he requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state." *Mullane v. Central Hanover Bank & Trust Co.,* 339 U. S. 306, 312 (1950).

Rather, this Court has required consideration of all "affiliating circumstances," whether the asserted jurisdiction purports to be *in personam* or *in rem.* See *Hanson v. Denckla,* 357 U. S. 235, 245-246 (1958). As the Third Circuit recently held in *U. S. Industries, Inc. v. Gregg,* 540 F. 2d 142, 156 (3rd Cir. 1976), *Mullane* and *Hanson* make clear that regardless of the label employed the requirements of *International Shoe* must be met.

In *U. S. Industries* the Third Circuit addressed the precise question here involved, specifically rejected the decision of the court below and held the application of the Delaware sequestration statute unconstitutional in the absence of minimum contacts. The court said:

> "We can only understand *Mullane* and *Hanson* as establishing a constitutional limit to state court jurisdiction wholly independent of the label—*in rem, quasi in rem,* or *in personam*—that may be affixed to that jurisdiction. And whether it be called affiliating circumstances or minimum contacts, we must assume that ultimately the test of *International Shoe* is determinative: That there be sufficient connection with the forum 'such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."' 326 U. S. at 316.
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> "Judge Gibbons' analysis [in *Jonnet v. Dollar Savings Bank*, 530 F. 2d 1123, 1130-1143 (3rd Cir. 1976) (concurring opinion)], a scholarly, carefully documented history of *quasi in rem* foreign attachment in the federal courts, develops a thesis to which we perceive no effective rebuttal. 'Although it can be argued,' he concludes, 'that the content of constitutional process due a litigant defending title to property will vary from that due a litigant defending himself from liability *in personam,* there is no reason to believe that the Supreme Court presently recognizes such a distinction . . . . In short, the same limitations of fundamental fairness apply to any exercise by the state of judicial powers, whether that exercise be denominated *in rem, quasi in rem* or *in personam.* One of those limitations . . . is the *International Shoe* rule.' *Ibid.*, at 1136-37. We agree." 540 F. 2d 154.

That analysis, compelling in the abstract, is irrefutable in the present context. The conceded purpose of the Delaware statute is to acquire *in personam,* not *quasi in rem* or *in rem* jurisdiction, and it bars any hearing on the rights of the parties to the property and precludes defendants altogether from appearing to litigate and defend a *quasi in rem* proceeding. To put it differently, Delaware's procedure offers only a choice between unilateral summary seizure and disposition of the property or *in personam* litigation, not limited to the seized property, based on the defendant's coerced general appearance.

The existence of a *quasi in rem* jurisdiction does not sanction a procedure which conditions the owner's right to defend his property on his consent to the conversion of *quasi in rem* to *in personam* jurisdiction. Cf. *Terral v. Burke Construction Co.*, 257 U. S. 529 (1922). If Delaware were to exercise legitimate *quasi in rem* jurisdiction, it would necessarily afford the owner of the property an unconditional opportunity to be heard and would limit any judgment in the proceeding to the property involved.[12] That of course, is not what it does; on the contrary, it permits the summary seizure of property under conditions which make the owner's deprivation of his property rights far more grievous than those in *Sniadach, Fuentes* and *North Georgia Finishing.* See Folk and Moyer, *Sequestra-*

12. Federal courts have long recognized this distinction between *quasi in rem* and *in personam* jurisdiction and have accordingly generally limited the power of a court to enter judgment in a *quasi in rem* proceeding to the value or the amount of the seized property. See *Minichiello v. Rosenberg,* 410 F. 2d 106, 111 (2nd Cir. 1968), *cert. denied,* 396 U. S. 844 (1969); *Farrell v. Piedmont Aviation, Inc.,* 411 F. 2d 812 (2nd Cir. 1969) *cert. denied,* 396 U. S. 840 (1969); *Podolsky v. Devinney,* 281 F. Supp. 488 (S. D. N. Y. 1968); *Dry Clime Lamp Corp. v. Edwards,* 389 F. 2d 590, 595-598 (5th Cir. 1968). See also *Simpson v. Loehmann,* 21 N. Y. 2d 305, 287 N. Y. S. 2d 633, 234 N. E. 2d 669, 671 (1967), *rearg. denied,* 21 N. Y. 2d 990, 290 N. Y. S. 2d 914, 238 N. E. 2d 319, 320 (1968).

tion in Delaware: A Constitutional Analysis, 73 Colum. L. Rev. at 789-795 (1973).

This procedure cannot in any meaningful sense be said to involve *in rem* or *quasi in rem* jurisdiction. As the Third Circuit found in *U. S. Industries:*

> "[T]he result we reach is buttressed by the operation in this case of the rule of *Sands v. Lefcourt Realty Corp., supra* [35 Del. Ch. 340, 117 A. 2d 365 (1955)]. Under the interpretation that case gave to the statutory schema, the nonresident defendant is inexorably put to a Hobson's choice: either surrender by default the entire value of the seized property or submit to *in personam* jurisdiction. Keeping in mind the admonition of *Mullane* that constitutional "standards do not depend on 'elusive and confused' state law classifications, we wonder whether this jurisdiction realistically ought to be considered as *quasi in rem.* The purpose of the Delaware procedure is to coerce the nonresident to submit to *in personam* jurisdiction. And it is difficult to conceive of a more potent jurisdiction—irrespective of its label—than the jurisdiction exercised here." 540 F. 2d at 156.

Nor can the Delaware procedure be justified on any theory that it "promotes judicial economy by concentrating the settlement of claims in one jurisdiction or action." (A. 115). This Court has consistently refused to allow constitutional rights to be sacrificed at the altar of efficiency and economy:

> "Procedural due process is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interests of the person whose possessions are about to be taken.

> "The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones. *Stanley v. Illinois,* 405 U. S. 645, 656, 92 S. Ct. 1208." *Fuentes v. Shevin,* 407 U. S. at 90-91, n. 22.[13]

Thus, whatever might be said for *quasi in rem* or *in rem* jurisdiction generally, it is clear that the Delaware procedure cannot be sustained on that basis. And, whatever the label attached, Delaware courts ought not to be permitted to exercise such jurisdiction in the absence of the minimum contacts required by *International Shoe.*

Finally, it is clear that defendants here lack the contacts required for the assertion of jurisdiction. The Delaware Supreme Court acknowledged that "plaintiff has failed to meet the prior contacts tests of *International Shoe.*" (A. 103; pp. 20-21 above). Certainly the ownership of stock and analogous rights in a Delaware corporation does not supply such contacts. See *U. S. Industries, Inc. v. Gregg,* 540 F. 2d at 155. Nor does such stock ownership constitute property within Delaware. Dela-

13. Moreover, sequestration does not accomplish what the Delaware court claims, for it reaches only those defendants unlucky enough to have property in Delaware. Sequestration simply bears no rational relationship to a goal of concentrating the resolution of claims in one jurisdiction or action.

ware's purported seizure of the capital stock owned by defendants is premised entirely on a fictional situs which Delaware law assigns to stock issued by Delaware corporations (8 *Del. C.* § 168).[14] In fact, none of the certificates held by any of the defendants was physically seized. Those certificates remain in the hands of their owners and are negotiable instruments under Delaware law (6 *Del. C.* §§ 8-102, 8-105, 8-301); a good faith purchaser who acquires the certificates would acquire good title to the shares it represents (see *Haas v. Haas*, 35 Del. Ch. 392, 400, 119 A. 2d 358, 362-363 (Ch. 1955); Folk, *The Delaware General Corporation Law*, 179-180 (1972)); and, of course, the state in which the certificate is located can seize it by attachment or other appropriate process, regardless of Delaware's sequestration. The Third Circuit in *U. S. Industries* concluded that this fictional situs of stock in the state of incorporation could not support jurisdiction. As it explained, the case for this fiction is no better than the case for the fiction that personalty is located at its owner's domicile, which this Court rejected in *Hanson v. Denckla*, (see 357 U. S. at 249). See 540 F. 2d at 156. See also *Jonnet v. Dollar Savings Bank*, 530 F. 2d 1123, 1139 (3rd Cir. 1976) (Gibbons, J., concurring).[15]

14. Examination of the Commercial Codes of the various states discloses that fifty-one jurisdictions have adopted Section 8-317 of the Uniform Commercial Code which provides that no attachment of shares of stock shall be valid "until the security is actually seized by the officer making the attachment." Delaware alone has modified that section by an amendment under which "the situs of the ownership of the capital stock of all corporations existing under the laws of this State . . . shall be regarded as in this State." 8 *Del. C.* § 169.

15. The purported exercise of jurisdiction on the basis of the fictional situs of stock, where the certificates are physically located outside of the state, has never been approved by this Court under the due process clause. *Rogers v. Guaranty Trust Co.*, 288 U. S. 123 (1933) and *Jellenik v. Huron Copper Mining Co.*, 177 U. S. 1 (1900), cited by the court below (A. 116) did not involve or deal with that issue. See *U. S. Industries, Inc. v. Gregg, supra*, 540 F. 2d at 150; *Jonnet v. Dollar Savings Bank*, 530 F. 2d at 1132-1139 (Gibbons, J., concurring). See also *Western Union Co. v. Pennsylvania*, 368 U. S. 71, 75 (1961).

Nor are there other factors, not considered by the courts below, which might establish the requisite minimum contacts between the defendants and a Delaware forum. In the Delaware Supreme Court plaintiff in fact attempted to argue that defendants had sufficient contact with Delaware to satisfy the requirements of due process because of their purported relation to a Delaware corporation. This argument was both irrelevant and without merit. It was irrelevant because there has been no personal service of summons on them, and Delaware has no long-arm statute authorizing such service. It was without merit because, even if Delaware had a long-arm statute, and even if proper service had been effected, simply being a director, officer or employee of a Delaware corporation is insufficient to subject them to personal jurisdiction in Delaware. See *Weller v. Cromwell Oil Company*, 504 F. 2d 927 (6th Cir. 1974); *Wilshire Oil Company v. Riffe*, 409 F. 2d 1277, 1281 (10th Cir. 1969); *Wagman v. Astle*, 380 F. Supp. 497, 499 (S. D. N. Y. 1974); *Fashion Two Twenty, Inc. v. Steinberg*, 339 F. Supp. 836, 841 (E. D. N. Y. 1971). Moreover, several of the individual defendants are not and have never been officers, directors, or employees of a Delaware corporation, and therefore lack even that tenuous connection with the state. See p. 4 above.

CONCLUSION.

For the reasons stated, the decision of the court below should be reversed and the case remanded with direction to dismiss for lack of jurisdiction.

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EXHIBIT A.

§ 366. *Compelling appearance of nonresident defendant.*

(a) If it appears in any complaint filed in the Court of Chancery that the defendant or any one or more of the defendants is a nonresident of the State, the Court may make an order directing such nonresident defendant or defendants to appear by a day certain to be designated. Such order shall be served on such nonresident defendant or defendants by mail or otherwise, if practicable, and shall be published in such manner as the Court directs, not less than once a week for 3 consecutive weeks. The Court may compel the appearance of the defendant by the seizure of all or any part of his property, which property may be sold under the order of the Court to pay the demand of the plaintiff, if the defendant does not appear, or otherwise defaults. Any defendant whose property shall have been so seized and who shall have entered a general appearance in the cause may, upon notice to the plaintiff, petition the Court for an order releasing such property or any part thereof from the seizure. The Court shall release such property unless the plaintiff shall satisfy the Court that because of other circumstances there is a reasonable possibility that such release may render it substantially less likely that plaintiff will obtain satisfaction of any judgment secured. If such petition shall not be granted, or if no such petition shall be filed, such property shall remain subject to seizure and may be sold to satisfy any judgment entered in the cause. The Court may at any time release such property or any part thereof upon the giving of sufficient security.

(b) The Court may make all necessary rules respecting the form of process, the manner of issuance and return thereof, the release of such property from seizure and for the sale of the property so seized, and may require the plaintiff to give approved security to abide any order of the Court respecting the property.

(c) Any transfer or assignment of the property so seized after the seizure thereof shall be void and after the sale of the property is made and confirmed, the purchaser shall be entitled to and have all the right, title and interest of the defendant in and to the property so seized and sold and such sale and confirmation shall transfer to the purchaser all the right, title and interest of the defendant in and to the property as fully as if the defendant had transferred the same to the purchaser in accordance with law. (Code 1852, § 1938; 17 Del. Laws, c. 215; Code 1915, § 3850; 34 Del. Laws, c. 216, § 2; 35 Del. Laws, c. 217; 36 Del. Laws, c. 268, § 1; Code 1935, § 4374; 10 Del. C. 1953, § 366; 50 Del. Laws, c. 379, § 1.)